BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSE ELLEN FERGUSON Claimant	)	
VS.	)	
HOLTON MANOR Respondent	)	Docket No. 1,013,363
AND	)	
KS. HEALTHCARE ASSN. INS. TRUST Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 26, 2005 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on January 4, 2006.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded the claimant a 74 percent work disability based upon a 100 percent wage loss and a 48 percent task loss.

The respondent requests review of the nature and extent of disability. Respondent argues that a wage should be imputed to claimant because she failed to make a good faith job search. Respondent further argues claimant retained the ability to earn the same wage as her pre-injury wage and the award should be limited to her functional impairment. In the

alternative, respondent argues the treating physician's task loss opinion should be adopted.

Conversely, claimant argues her job search was appropriate and in good faith. Claimant, therefore, requests the Board to affirm the ALJ's Award.

The sole issue for Board review is the nature and extent of claimant's disability. In particular, the Board must consider whether the claimant made a good faith effort to find appropriate employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked in the laundry and housekeeping department for the respondent. She began to experience numbness and tingling in her hands. She sought treatment with her family physician, who prescribed some support braces and referred her for further testing. Claimant testified the respondent did not have any work that would accommodate the braces. The last day the claimant worked for the respondent was September 23, 2003. The respondent then terminated the claimant due to absenteeism.

Claimant's physician referred her to Dr. Michael J. Schmidt, board certified in orthopedic surgery. The doctor examined and evaluated the claimant on November 19, 2003, due to upper extremity problems. Dr. Schmidt diagnosed the claimant as having bilateral chronic ulnar neuropathy. The doctor prescribed conservative treatment which failed to relieve claimant's symptoms. The doctor then recommended surgery.

After a preliminary hearing, Dr. Schmidt was designated the authorized treating physician. On February 10, 2004, Dr. Schmidt performed an ulnar transposition on claimant's right elbow and then her left was done on July 30, 2004. The claimant was released at maximum medical improvement on September 16, 2004.

The claimant lives in Soldier, Kansas which is an approximate 20 minute drive from Holton, Kansas, and 55 minutes from Topeka, Kansas. The claimant offered an exhibit at the regular hearing which listed 120 businesses she had contacted seeking employment. She indicated these contacts had occurred during the latter part of 2004 over a five or six week period of time. And she noted the list was not complete because she had contacted additional businesses before she was aware she should be keeping a list of prospective employers that she had contacted. As a result she noted that the total number of contacts she had made was from 200 to 350 including the area close to her home and on into Topeka, Kansas.

Claimant applied for work at every business in Holton as well as the area she felt she could reasonably travel to work. She called prospective employers in Topeka because she did not have the financial means to travel that distance looking for work. She further noted that jobs in Topeka that only paid minimum wage were probably not practical because of the cost to commute.

Claimant also went to Job Service and was referred for job placement testing. Claimant was advised she would be provided retraining after paperwork was completed. And claimant indicated that process was, although belatedly, still being pursued.

The regular hearing in this matter was continued and when completed approximately three months later, the claimant indicated that she had just made an additional three applications in that time. However, she explained that there was nowhere new to apply and instead she had re-contacted numerous employers to check on the status of the applications for employment that she had already submitted.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e(a), which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e(a), the worker's post-injury wages

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[3]

The term "good faith" does not appear in the Workers Compensation Act and, therefore, there is no statutory definition for that term. The Kansas Appellate Courts have indicated that good faith should be determined on a case-by-case basis.[4]

The claimant lives in a small town and it is an approximate 20 minute commute to Holton, a larger town with more prospective employers. As previously noted, claimant applied for work at every business in Holton as well as the area she felt she could reasonably travel to work.

Respondent, in its brief to the Board, argued, "Good faith effort should mean more than calling all the businesses in town and asking if work is available." However, respondent gives no explanation nor further suggestions of what claimant could or should be reasonably expected to do. It is difficult to imagine what additional effort claimant could make beyond contacting every business within a reasonable commuting distance. Because of her lack of finances due to her unemployment, her job search is, of necessity, limited to the area close to where she lives and where she can reasonably be expected to travel to work. It cannot be seriously disputed that claimant did not make a good faith effort to find employment based on the number of contacts she made before the regular hearing.

Claimant initially has the burden of proving she made a good faith effort to obtain appropriate employment post-accident.[5] But at some point that burden may shift to respondent.[6] Respondent next argues that claimant made no additional employment contacts in the approximate three month time period after the regular hearing. But the claimant described leaving applications at three additional employers during this time period. Moreover she testified that she continued to re-contact those employers that she had already contacted to check on the status of her applications. There are a limited number of prospective employers in the area claimant can reasonably be expected to

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[3] *Id.* at 320.

[4] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[6] *See Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

travel and after an initial contact the only option is to again make contact to see if anything has changed. The only evidence is that claimant continued looking for work in that manner. Although there is evidence that improvements could be made to claimant's job search, respondent has not offered claimant any professional job placement assistance. The Board finds that claimant continued making a good faith job search.

The Board is mindful that almost any job, even part time, would likely return claimant to 90 percent of her pre-injury average gross weekly wage. It appears job placement assistance would certainly be warranted and well worth the effort under these circumstances. Nonetheless, based upon the record compiled to date claimant not only made a good faith job search before the regular hearing but also continued to look for employment afterwards up to the close of the record at the continuation of the regular hearing. The Board affirms the ALJ's conclusion that claimant demonstrated good faith in searching for post-injury employment and that she is entitled to a 100 percent wage loss as a result of her work-related injury.

Drs. Schmidt and Zimmerman each provided work restrictions and offered task loss opinions that varied from 24 percent to 72 percent. The Board has considered this evidence and concludes that neither task loss opinion is more persuasive than the other and as such, it will average the two. Consequently, the claimant suffers a 48 percent task loss. When that figure is averaged with the 100 percent wage loss, the result is 74 percent work disability. The ALJ's Award is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 26, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director